

NO. 45927-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GWYNETH POPE and DANIEL STACEY,

Appellants (Plaintiffs),

v.

BRUCE and PATRICIA GARDNER,

Respondents (Defendants).

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF REPLY

This case exists because the Defendants Bruce and Patricia Gardner ("Gardners") encroached upon the Plaintiffs Gwyneth Pope and Daniel Stacy's ("Pope/Stacey") land.

The trial court erred in dismissing the request for damages as a result of the nine (9) years of encroachment onto the Pope/Stacey property. There are sufficient issues of material fact to allow the case to proceed to trial. Additionally, the trial court erred in granting attorneys' fees to the Gardners.

In the absence of any demonstrated abuse of discretion, there is no basis for an award of CR11 sanctions.

II. REPLY ARGUMENTS

1. The trial court did err in granting summary judgment in favor of the Gardners and dismissing Pope/Stacey's trespass and development delay damages claims because there were genuine issues of material fact as to the type of trespass and the extent of damages.

2. The trial court erred by finding the Gardners as the prevailing party and entering an award of attorney fees in their favor.

3. The trial court did not err in determining there was no basis for an award of fees under CR 11.

III. RESTATEMENT OF THE CASE

A. FACTUAL STATEMENT

The Gardners and Pope/Stacey own neighboring parcels of property on Summit Lake in Thurston County, Washington. The Gardners purchased their parcel in 2002. In 2003, the Gardners began a construction project to build a residence on their property.

Pope/Stacey purchased two parcels, 1703 and 1705 Summit Lake parcels, in August 2004, sharing a property line with the Gardners. There is a lake cabin on the 1703 Summit Lake parcel, and an A-frame and dock on the 1705 Summit Lake parcel. Pope/Stacey intended to remodel both the lake cabin and A-frame into new residences. (CP 207, 337).

In 2004, the Gardners began a construction project to build a residence on their property. Pope/Stacey became concerned that the Gardners had built a portion of their residence over the property line. In December 2004, Pope/Stacey had a survey done by Apogee Land Surveying, Inc. The survey showed that the Gardners had built a concrete retaining wall, utility poles, and multi-story deck that encroached upon the Pope/Stacey property. CP 208.

In 2008, the extent of the damage of the Gardner's encroachment upon the Pope/Stacey property was more clearly demonstrated when their

own remodeling projects were determined to be impossible unless the encroachment were removed. CP 208. Jim Hunter of Hunter & Associates had advised building placement and septic system design could not be determined with the encroachments. Additionally, they were advised that applications to Thurston County for building permits would be delayed or denied until the encroachments were removed and development plans were finalized. CP 118-120: Declaration of Jim Hunter.

Pope/Stacey contacted the Gardners, personally and through attorneys, in an attempt to have the encroachments removed. But the Gardners refused to do so. In 2010, Pope/Stacey had another survey conducted by Bracy & Thomas Land Surveyors. This survey also confirmed that: (1) the Gardners' deck, utility poles, and retaining wall encroached onto Pope/Stacey's property and (2) the deck, retaining wall, and outside stairway of the house violated Thurston County setback rules. CP 121-123: Declaration of Bruce Studeman.

B. PROCEDURAL HISTORY

After unsuccessfully attempting to have the Gardners remove the encroachments, Pope/Stacey filed an action in October 2010 seeking an Injunction and Damages For Trespass And Quiet Title For Prescriptive Easement. CP 266-271. The claims regarding the prescriptive easement

were dismissed through an order for partial summary judgment. CP 69-70.

The remaining encroachment claims were resolved through mediation, with the parties entering an Agreed Interim Judgment of Injunctive Relief signed by Judge Lisa Sutton on August 10, 2012. CP 335-339. Under this agreement, the Gardners agreed to remove all of the encroachments across the Pope/Stacey property line and that within fourteen days of its entry, the Gardners would apply for any necessary permits to begin to remove the encroachments.

During all of the proceedings, to include mediation in, and the drafting and entry of this Agreed Interim Judgment, the Gardners were represented by counsel. Yet, despite the clear language and terms of the agreement, the Gardners failed to remove the encroachments until the September 2012 and to cure the set back issues until July 2013. CP 81. The agreement specifically did not address the damages incurred by Pope/Stacey as a result of the Gardner's encroachment. Instead, it noted that the Plaintiff's, i.e., Pope and Stacey, reserved their rights to raise any remaining issues of damages. In December 2013, the Gardners filed a motion for Summary Judgment. The trial court granted the Gardners motion for Summary Judgment in January 2014. CP 154-155. The trial

court further ruled that the Gardners were entitled to attorney fees in the amount of \$6,643.75. CP 231-234.

V. REPLY ARGUMENTS

A. The Trial Court Erred In Granting The Gardners Summary Judgment When There Were Questions Of Material Fact As To Whether A Trespass Existed and The Amount Of Damages Incurred For The Gardners Failure To Remove Their Encroachment Onto The Pope/Stacey Property.

This Court reviews de novo a summary judgment order, and the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 9 P.3d 108 (2004), *Jones v. Allstate Ins. Co.*, 146 Wash.2d P.3d 854 (2002), *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 285 P.3d 854 (2012). A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In determining whether summary judgment was proper, the appellate court should consider all facts, and the reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist.No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). A court should grant summary judgment only if reasonable persons could reach but one conclusion from all the evidence. *Id.*, 154 Wn.2d at 26.

In the case of a continuing trespass, the applicable statute of limitations does not preclude a property owner from bringing an action. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash.2d 693, 709 P.2d 782 (1985). Therefore, under established law, Pope/Stacey are/were entitled to bring their cause of action.

The question is one of the limitation of damages. If the trespass is a continuing trespass, then the statute of limitations does not run from the date the tort begins; rather, it is applied retrospectively to allow recovery for damages sustained within three years of filing. Further, damages are recoverable from three years before filing until the trespass is abated or, if not abated, until the time of trial. *Woldson v. Woodhead*, 159 Wash.2d 215, 149 P.3d 361 (2006).

It is critical to the present case that whether a trespass is a continuing or permanent trespass is a *question of fact for the jury*. See *Fradkin v. Northshore Util. Dist.*, 96 Wn. App 118, 977 P.2d 1265 (1999). In *Fradkin*, a trespass claim was brought against a utility company for negligently installing a sewer line causing water to flood the plaintiff's property. The utility district claimed the action was barred by the statute of limitations. The court noted the initial injury occurred seven years prior to filing the suit. It held that if the action were for a continuous trespass then

recovery for the three years of trespass prior to filing *was not* barred by the statute of limitations.

More critically and directly relevant to the present case, the court concluded, "It remains an *issue of fact for the jury* to decide whether Northshore trespassed, and, if so, whether the trespass was continuing or permanent. If the jury finds a continuing trespass, *Fradkin* is not time-barred from recovering damages occurring after May 12, 1994." *Id.* at 126. (emphasis added.)

As this is an issue of fact for a jury determination, summary judgment was not appropriate, where these facts were in dispute.

B. Pope/Stacey Presented Evidence Of Actual And Substantial Damages And As Such There Existed Genuine Issues Of Material Fact That Were In Dispute.

Pope/Stacey's architect, septic designer, and geologist all provided evidence that, given the steep slope of the property toward the lake, the encroachments prevented the development of design plans that would be able to properly designate the placement of a new dwelling and the septic system. CP at 105 (Expert Opinion of Jim Hunter), CP at 112 (Expert Opinion of Cary Westerbeck); and CP at 114 (Expert Opinion of David Strong).

The continued argument by the Gardners that any proposed development was merely hypothetical is simply inconsistent with the document record below, which clearly includes testimony by experts who specifically advised that development should not begin until the encroachments were removed. Both experts advised Pope/Stacey that any attempt to pursue applications for redevelopment would be futile.

Evidence of actual and substantial damages was offered by Todd Wilmovsky, expert real estate appraiser. Wilmovsky offered testimony regarding damages and determined that the costs to Pope/Stacey was \$56,000. CP 402-417, 531-541. Neither Wilmovsky's testimony nor the figures he presented were hypothetical. Rather, his estimate was based upon his training, experience, evaluation of the property, and calculation of loss of use of their property.

Damages allowed for continuing trespass include the value of the use of the property, reasonable cost of repair or restoration to the property's original condition, and the costs of recovering possession. It is simply inaccurate to suggest that there were no actual alleged damages. For example, damages were discussed in terms of the permanent damage to the drive way. See CP at 94-95.

The disagreement regarding the source and extent of damages creates an issue of material fact that precludes summary judgment.

To allow the Defendants to have encroached upon the land of another to an extent that the lawful owners are/were unable to use the land or build upon the land and then to further permit them to assert the absence of the construction renders damages hypothetical creates an unfair obstacle to the recovery of damages. It permits and promotes unjust enrichment.

Further, it should be noted that in support of their contention that the Plaintiffs have provided no proof of actual or substantial damages, the Defendants heavily rely upon *Wallace v. Lewis County*, 134 Wn.App. 1, 137 P.3d 101 (2006), which cites to *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). Both of these cases are distinguishable as in both of these cases, in examining and determining the whether there was actual or substantial damages, the Courts were looking at transitory issues. In *Wallace*, the alleged trespass was based upon rodents and mosquitoes. In *Bradley*, the Court was examining the specific question of a cause of action for trespass under the Washington Clean Air Act based upon microscopic particles.

C. The Trial Court Erred In Awarding The Gardners Attorney Fees As The Prevailing Party Since Summary Judgment Should Not Have Been Granted.

Because the Gardners were not entitled to summary judgment as a matter of law, they should not be able to recover attorney fees as the prevailing party.

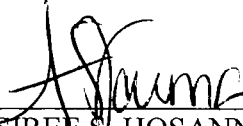
D. The Trial Court Was Correct in Declining to Grant Attorney Fees Under CR 11.

Whether a party is entitled to attorney fees is an issue of law and is reviewed de novo. *North Coast Electric Co. v. Selig*, 136 Wn.App.636, 642-643, 151 P.3d 211 (2007). The inquiry is a two prong analysis, with the first determination being as to whether the prevailing party was entitled to attorney fees; the second inquiry being whether the amount of fees awarded was reasonable. The second inquiry is reviewed for abuse of discretion. *Ethridge v. Hwang*, 105 Wn.App. 447, 459-460, 20 P.3d 958 (2001).

VIII. CONCLUSION

Plaintiffs/Appellants respectfully requests that this Court reverse the superior court's granting of summary judgment and entry of attorney fees. It is also respectfully requested that this Court award attorney fees to Pope/Stacey on appeal.

RESPECTFULLY SUBMITTED this 20TH day of October, 2014.



DESIREE S. HOSANNAH / WSBA #31150
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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:


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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20th day of October, 2014 at Lakewood, Washington.



Shirley Mitchell-Nelson, Legal Assistant

HOSANNAH LAW GROUP PLLC

October 20, 2014 - 3:27 PM

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